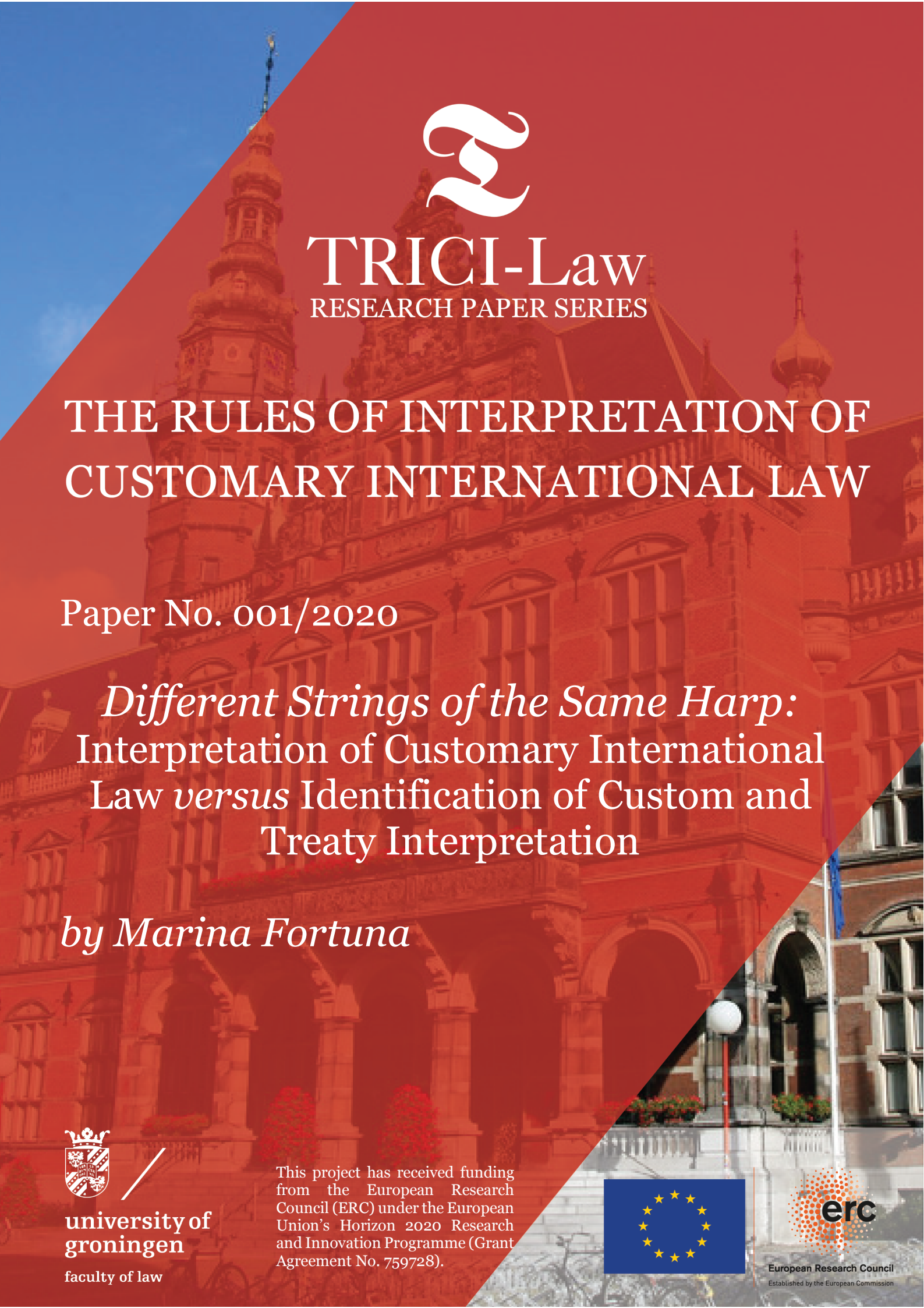

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 001/2020

Different Strings of the Same Harp: Interpretation of Customary International Law *versus* Identification of Custom and Treaty Interpretation

by Marina Fortuna

university of groningen
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Working Version March 2020

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Introduction

At the heart of all knowledge lies *difference* – the ability to distinguish one concept from another one.[1] From Heraclitus to Derrida and Deleuze, philosophers have grappled with issues of 'identity' and 'difference' and, though not settling on a *single* truth, have equipped humanity with a conceptual toolbox for purposes of categorization of human experience.[2] Differentiation between concepts and their objects is as important in law as it is in other disciplines and is one of the fundamental instruments in the toolbox of legal scholars in their pursuit to understand the workings of law.

This paper proceeds from this point and aims to analyze in Section 1 the extent to which interpretation of customary international law (hereinafter CIL) differs from treaty interpretation, identification of CIL and deductive reasoning. Interpretation of CIL is a process of content determination of custom, which is subsequent to identification of custom and is analogous to treaty interpretation.[3] The expression 'interpretation of customary law' features prominently in the practice of international courts and tribunals either explicitly or implicitly. In the former case, judges from international courts and tribunals themselves say that what they are doing is interpretation of customary law/rules. In the latter case, judges use methods similar to those contained within the rule of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties (hereinafter VCLT) to construe the content of customary rules. The reliance of judges on the rules of treaty interpretation to interpret custom raises the question whether interpretation of customary international law is qualitatively similar to interpretation of treaty rules.

By the same token, interpretation of CIL can raise questions with regard to its relationship with identification of customary rules, which will be the subject of analysis in Section 2. In a nutshell, it has been argued in legal scholarship that while identification of customary international law is a process of law-ascertainment and content determination, interpretation is exclusively a process of content determination. Interpretation, as opposed to identification, deals with a previously identified customary rule and, therefore, is subsequent to identification. Moreover, the two processes differ with respect to their object of analysis and, to some extent, also in the method(s) used when judges engage in these two processes. Furthermore, while both identification of CIL and interpretation of CIL involve both reasoning and choice on behalf of

*The author expresses her gratitude to Panos Merkouris, André de Hoogh, Sotirios-Ioannis Lekkas and Alexandros-Cătălin Bakos for their valuable suggestions and comments offered during the different stages of writing.

[1] Wernon V. Cisney, 'Differential Ontology' Internet Encyclopedia of Philosophy <https://www.iep.utm.edu/diff-ont/> accessed 10 November 2019.

[2] ibid.

[3] Panos Merkouris, *Article 31 (3) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave* (Brill 2015) 231-300; Panos Merkouris, 'Interpreting the Customary Rules of Interpretation' (2017) 19 International Community Law Review 127; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008); Albert Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) ZaöRV 505.

judges, broadly speaking, identification is an inductive process, whereas interpretation is a deductive one. In addition, this Section will examine the extent to which interpretation of CIL differs from deductive reasoning, which is a question tangential to that of method.

1. Interpretation of Customary International Law and Treaty Interpretation

This section focuses on the similarities and differences between interpretation of CIL and interpretation of treaty rules. Section 1.1. introduces the notion of interpretation of CIL and gives some examples from international case law where judges have used methods of treaty interpretation for what they have explicitly or implicitly recognized as interpretation of customary rules. The examples are by far non-exhaustive and have been selected based on the criterion of diversity of method used.

It will be shown that some of methods used are identical, whereas others are similar to the methods contained in the rule of treaty interpretation in Article 31 of the VCLT. Considering this identity in some cases and similarity in others, Section 1.2 engages in a theoretical reflection of whether it can be argued that the act of interpretation in the case of customary rules is similar to interpretation of treaties, by reference to the purpose and essence of the interpretative act. It is followed by Section 1.3, which discusses the importance in distinguishing between treaty interpretation and interpretation of CIL in practice.

1.1. Interpretation of Customary International Law

Customary international law is, according to Article 38(1)(b) of the Statute of the International Court of Justice (hereinafter ICJ), one of the sources of law to be applied by the ICJ. In conformity with the provisions of this article, customary international law is 'general practice accepted as law' and, according to the case law of the ICJ, has been found to comprise two elements: state practice and *opinio juris*.[4] The law-ascertainment of customary rules, otherwise known as identification of custom, is the act of identifying the two composite elements of custom. As opposed to identification, interpretation of customary international law is exclusively a process of content determination, which, time-wise, occurs subsequently to the identification of customary international law.[5] The notion of 'interpretation of customary law' features prominently in the practice of international courts and tribunals either explicitly or implicitly. In the former case, judges themselves say that what they are doing is 'interpretation of customary law' or interpretation of customary rules. In the latter case, judges use methods similar to those contained in the rule of treaty interpretation enshrined in Article 31 of the VCLT to construe the content of customary rules. Article 31 enshrines different methods of interpretation, of which the ones relevant to this analysis are: interpretation in accordance with ordinary meaning (or textual interpretation), interpretation by reference to other relevant rules of international law (systemic

[4] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Merits) [1969] ICJ Rep 3 [77]. *See also S.S.'Lotus'(France/Turkey)* Judgment [1927] PCIJ Series A No. 10, p. 28; *Asylum Case (Colombia/Peru)* Judgment [1950] ICJ Rep 266, p. 276-277. For an analysis of the evolution of the elements custom *see* Jean d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 International Community Law Review 229.
[5] Merkouris (2017) (n3) 136.

interpretation)[6] and interpretation by reference to the object and purpose of the treaty (or teleological interpretation).

a) Interpretation in Accordance with Ordinary Meaning (Textual Interpretation)

An example of judicial practice where an attempt to interpret a customary rule by reference to 'ordinary meaning of the terms' has been made is the *Hadzihasanović*[7] Decision on Interlocutory Appeal from the International Tribunal for the Former Yugoslavia (hereinafter ICTY). Two legal issues where raised in this decision: (1) whether the principle of command responsibility applicable to international armed conflict is also applicable to non-international armed conflict and (2) whether a superior can be punished under the principle of command responsibility for acts committed by subordinates prior to the assumption of command. To solve the first legal issue the Tribunal first analyzed state practice and *opinio juris*. Having found no specific state practice and *opinio juris* on the principle of command responsibility for acts committed in *non-international* armed conflict, the Tribunal argued that 'where a principle can be shown to have been so established [on the basis of state practice and *opinio juris*], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle'.[8] In other words, considering that there was already in place a customary law principle of command responsibility in the case of *international* armed conflict, it could have been applied by analogy to non-international armed conflict as well. To support this argument, the Appeals Chamber of the ICTY relied on the prohibitions contained in common Article 3 of the Geneva Conventions and reasoned that 'in the absence of anything to the contrary, it is the task of a court to interpret the underlying State practice and *opinio juris* […] as bearing its *normal meaning* that military organization implies responsible command and that responsible command in turn implies command responsibility'.[9]

The argument made by the Appeals Chamber is rather complex. Firstly, the second part of the Tribunal's argument seems to refer to interpretation of state practice and *opinio juris* (see *infra* Section 2.2.) and it could mean different things. One way to read this is that the Appeals Chamber referred to interpretation of State practice and *opinio juris* at the stage of initial ascertainment of customary international law. As shall be demonstrated in Section 2 of this paper, 'interpretation' at the stage of identification of customary rules has a different meaning than interpretation of customary *rules*. Essentially, it means either determining, in the face of contradictory practice, which practice prevails or explaining the meaning of distinct instances of state practice. Another way to the statement of the Appeals Chamber however, is that by reference to state practice and *opinio juris*, as elements that comprise customary rules, the Appeals Chamber meant the interpretation of customary rules. A third reading of the two statements of the Appeals Chamber taken together might suggest that it was applying the law applicable to international armed conflict to internal armed conflict by way of analogy and

[6] Cite works that use systemic interpretation
[7] *Prosecutor v Hadzihasanović et. al*, ICTY, Case no. IT-01-47-AR72 Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of 16 July 2003.
[8] Ibid [12].
[9] Ibid [17].

sought to justify this analogy, among others, by resorting to an interpretation in accordance with ordinary meaning (normal meaning being strikingly similar with ordinary meaning).

In whichever way these statements are read, they have two implications. Firstly, they demonstrate that the notion of 'interpretation' with customary rules as its object is not alien to judges. Secondly, they attest that judges borrow methods from the realm of treaty interpretation (if only to justify their decisions) and apply them to customary rules.

The reference to ordinary meaning with respect to custom also, inevitably, raises the question whether judges conceive the possibility that customary rules can be an object of textual interpretation. At first glance, this appears to be a contradiction in terms, because customary rules are, by nature, unwritten rules and, therefore, have no text – they are materialized in practice and do not, as such, exist in a linguistic form. It should be conceded that some forms of state practice exist in the form of written word – legislation of States and domestic judicial decisions are two relevant examples. Nonetheless, state practice is just one *element* of a customary rule and, therefore, is not identical to the rule itself. This means that even the written form of state practice does not transform the customary rule in a linguistic form. It follows that, absent a linguistic form, customary rules cannot as such be subject to textual interpretation. According to Merkouris, even the interpretation of a customary rule which is embodied in a treaty(a treaty that codified it), does not qualify as an example of textual interpretation.[10] This is because, in such a case, it is the treaty terms that are interpreted textually, rather than the customary rule.[11] However, codification treaties can be used to interpret customary rules, which qualifies as s form of systemic interpretation of custom.[12]

b) Interpretation in Light of Object and Purpose (Teleological)

Object and purpose have been used as reference point in the same case by one of the dissenting judges. Judge Shahabudeen dissented from the majority decision on the second legal question posed in *Hadzihasanović.*[13] Whereas it was indisputable that a commander who was in command during the time that the subordinates committed an offence, it was unclear whether a superior can be punished under the principle of command responsibility (which comprises two duties: a duty to prevent and a duty to punish) for acts committed by subordinates *prior* to the assumption of command. Similar to treaty interpretation, where the content of treaty rules is determined by reference to the object and purpose of the treaty, Judge Shahabudeen argued that the customary rule of command responsibility should be interpreted in the same way. He explicitly qualified his process of reasoning as interpretative in nature,[14] referred to Article 31 of the VCL,[15] and stated that any interpretation could be made by reference to the object and purpose of the treaty rule that codified the customary rule of command responsibility.

[10] Merkouris (2015) (n 3) 264- 265.
[11] Ibid. For a connected issue *See Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* (Merits) [2012] ICJ Rep 99 [67]-[69] for an example where an interpretation given with respect to the scope of a treaty was taken as reflective of the state of customary international law.
[12] Merkouris (2015) (n 3) 265.
[13] *Prosecutor v. Hadzihasanović* (n 5).
[14] *Prosecutor v. Hadzihasanović* (n 5) Partial Dissenting Opinion of Judge Shahabuddeen [9].
[15] *Prosecutor v Hadzihasanović* (n 5) Dissenting Opinion Judge Shahabudeen [11].

Teleological interpretation was also used as an interpretative method in the *Orić* case, where the *ratio decidendi* in *Hadzihasanović* was the object of contention.[16] In this case, Judge Schomburg argued that the customary principle of command responsibility must be interpreted by giving 'consideration to the *purpose* of a superior's obligation to effectively make his subordinates criminally accountable for breaches of the law of armed conflict'.[17] He then emphasized that 'considering thus the *purpose* of superior responsibility, it is arbitrary – and contrary to the *spirit* of international humanitarian law – to require for a superior's individual criminal responsibility that the subordinate's conduct took place only when he was placed under the superior's effective control'.[18]

One can note the difference between the approaches of these two judges. Whereas Judge Shahabudeen took the rule of interpretation from Article 31 of the VCLT and followed it rigorously by interpreting the customary rule by reference to the *treaty rule* which codified it, Judge Schomburg proceeded in a different manner. He construed the customary rule by reference to both the purpose of the rule itself, but also by reference to the spirit of the branch of international law to which the rule belongs.[19] In essence, Judge Schomburg seems to have proceeded from the rule in Article 31 VCLT, yet brought some variation to the original method of interpretation by altering the object of reference by which object and purpose was analyzed – instead of the object and purpose of a treaty, he looked into the purpose of the branch of international law to which the customary rule belonged.

c) Interpretation by Reference to Other Relevant Rules (Systemic Interpretation)

The method of systemic interpretation (or systemic integration) was used by the Trial Chamber of the ICTY in the *Furundžija* case.[20] The legal issue was the problem of the definition of rape and the forms of behaviour that fall under this offence (in particular, whether oral penetration can qualify as rape). The Trial Chamber, firstly, stated that the prohibition of rape in armed conflict has evolved into a norm of customary international law,[21] yet found that international law (either treaty or custom) contains no definition of rape.[22] Then, it scrutinized national legislation and found major discrepancies between the criminal laws of various countries as to the definition of rape and whether oral penetration qualifies as rape or a different type of sexual assault.[23] Lastly, it resorted to the principle of respect for human dignity to interpret the crime of rape. The Trial Chamber noted 'it is consonant with this principle [principle of protection of human dignity] that such an extremely serious sexual outrage as forced oral penetration should be classified as rape'.[24]

[16] *Prosecutor v. Orić*, ICTY, Case no. IT-03-68-A Appeals Chamber Judgement of 3 July 2008.
[17] *Prosecutor v. Orić* (n 12) Dissenting Opinion of Judge Schomburg [16] emphasis added.
[18] Ibid [17] emphasis added.
[19] See also Merkouris (n 3) (2015) 265-266, esp. for the classification of such a method of interpretation as systemic integration.
[20] *Prosecutor v. Furundžija*, ICTY, Case no. IT-95-17/1-T Trial Chamber Judgment of 10 December 1998.
[21] Ibid [168].
[22] Ibid [174].
[23] Ibid [178]-[182].
[24] Ibid [183] Emphasis added.

As the statement reveals, the Trial Chamber did not *apply* the principle of protection of human dignity to the case directly,[25] but it determined the definition of rape in consonance with this principle.

One possible issue that could be raised is whether it is a process of content determination of customary rules or not, since the Tribunal does not say so explicitly. However, upon a contextual reading of the judgment, it is apparent that *Furundžija* was further found guilty on charges of rape as a violation of the laws and *customs* of war. This means that the formal source of the criminal conduct he was liable for was general international law and not a treaty, which supports the conclusion that the quoted paragraph is an instance of CIL interpretation. In any event, even assuming that the Tribunal was interpreting the offence of rape in both treaty law and customary international law, it still qualifies as interpretation of CIL, because the essence of the act was the interpretation of a concept which exists in CIL as well.

Turning to the question of how the content of the crime of rape, recognized also in customary law, was determined, the language of the Trial Chamber suggests that for construing the definition of rape it used, according to the Trial Chamber, a general principle of international humanitarian law – the protection of human dignity. Using one rule/principle for the interpretation of another rule is the essence of the principle of systemic interpretation. Without passing judgment on the precise meaning of this rule,[26] it is safe to say that, according to legal scholars, systemic interpretation seeks to ensure the coherence of international law as a system in which norms operate harmoniously with each other and could be qualified metaphorically as the 'glue stick' tool of international law.[27] Judging from *Furundžija*, it seems to be a principle that is equally applicable to interpretation of customary international law.

1.2. Theoretical Reflections on the Distinction between Customary Law and Treaty Law Interpretation

Following the examples from the case law of international criminal courts and tribunals presented earlier, which attests the references to interpretation of custom and usage of methods of treaty interpretation when construing customary rules, the inquiry now turns to considering the question whether there is a difference in nature between the concept of interpretation of CIL and that of treaty interpretation. Besides demonstrating the operation of interpretation of CIL in the practice of international criminal courts, Section 1.1 has also shown that in the interpretation of customary rules judges use similar methods as those used in treaty interpretation. However, a question arises whether the similarity in methods used also means that there is a similarity in the purpose and essence of the two processes. In other words, this subsection of the paper explores the question whether interpretation of customary rules and interpretation of treaty rules, being similar by method and name, are also similar in their essence.

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[25] On the differences between 'interpretation' and 'application' see A. Gourgourinis, 'The Distinction Between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) Journal of International Dispute Settlement 31.
[26] For an in-depth analysis of the principle of systemic integration see Merkouris (2015) (n 3).
[27] For discussions on systemic interpretation *see* Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 International and Comparative Law Quarterly 557; Merkouris (2015) (n 3); Jorg Kammerhofer, 'Systemic Integration, Legal Theory and the International Law Commission' (2008) 19 Finnish Yearbook of International Law 157; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention (2005) 54 International and Comparative Law Quarterly' 279.

When the codification of the rules of treaty interpretation was first undertaken by the Harvard Research Group in the 1930s, it has defined interpretation as 'the process of determining the meaning of a text'.[28] In a similar vein the ILC specified in its Commentaries to the Draft articles on the law of treaties that 'the starting point of interpretation is the elucidation of the meaning of the text'.[29] Albeit not being exclusively limited to the analysis of the treaty text, treaty interpretation starts off from the analysis of the text, which is considered to be an authentic expression of the intentions of the parties.[30] Customary rules, on the other hand, are unwritten rules. Their nature is that of a collection of state practice coupled with *opinio juris* and language is only necessary for custom to the extent that the content of customary rules is communicated by and to the subjects of law.[31] It is this last observation that has led Treves to state that 'the irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply' customary rules.[32] In other words, according to Treves, interpretation is only necessary when there is a linguistic form. This follows a *stricto sensu* understanding of interpretation where the essence of the process is attached to text, similarly to what happens in treaty interpretation (text becomes a key characteristic of treaty interpretation). Considering that customary rules do not, as such, exist in linguistic form and, therefore, their interpretation, as discussed in Section 1.1 does not involve textual analysis *stricto sensu*, it would result that customary rules cannot be subject to interpretation in the same way as treaty rules are. Taking this together with the observation that treaty interpretation has at its epicenter/point of departure the text of the treaty, it could be argued that the nature of what judges refer to as interpretation of custom is, as a process, different not only in object, but also in essence from treaty interpretation. Yet, such an argument, considering the fact that Article 31 prescribes a general rule of interpretation which is not limited to textual interpretation, will ultimately depend on the (primary) role accorded to the text.

From a vantage point that uses a greater degree of abstraction, it would be possible to argue that interpretation of CIL and treaty interpretation are similar in essence based on the more general definition of legal interpretation. Black's Law dictionary defines legal interpretation as 'the process of determining what something, esp. the law or a legal document, means; the ascertainment of meaning to be given to words or other manifestations of intention'.[33] Taking this definition as a starting point, it can be observed that to qualify as interpretation (according to this definition at least) an intention should be present, where intention is 'the willingness to bring about something planned or foreseen; the state of being set to do something'.[34] If text is a manifested intention in the case of treaties[35] and there is an external manifestation of intention in

[28] Draft Convention on the Law of Treaties, With Comment (1935) 29 The American Journal of International Law, Supplement: Research in International Law 653, 938.
[29] ILC, Yearbook of the International Law Commission 1966, Vol. II, 'Draft Articles on the Law of Treaties with commentaries' 187-274, 220.
[30] This is a reflection of the choice made by the drafters of the VCLT to opt out of three main approaches advocated in legal literature for the compromise between a textualist and a teleological approach. *See* Francis G Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 Int'l & Comp LQ 318, 331.
[31] Tullio Treves, Customary International Law MPEPIL 1393 (November 2006) accessed 12 December 2019.
[32] Ibid.
[33] Bryan Garner, (ed), *Black's Law Dictionary* (first published 2000, 9th ed, Thomson West 2009).
[34] Ibid.
[35] ILC 'Draft Articles on the Law of Treaties with commentaries' (n 28) p. 220 [11].

the case of custom that is similar to text, then an argument can be made by analogy with respect to the similarity in the essence of the two processes of interpretation.

What then could qualify as manifested intention in the case of custom? Firstly, as has been previously pointed out, the linguistic form is not by itself a characteristic of custom. Moreover, even if some customary rules may be reflected in a written text as a result of codification, there are still many customary rules that do not. Therefore, it cannot be said that the text of a codified customary rule reflects the manifested intention of States participating in the process of custom formation.

Another possibility would be to consider that the intentions of States are embodied in the customary rule as a verbal rule. Nevertheless, as Treves points out, it is difficult to say that custom is embodied in a linguistic physical manifestation (as the text, in the case of a treaty) since the core of the idea of custom is that it is a collection of practice. Even if some instances of state practice or *opinio juris* are emitted verbally (for instance, declarations of state officials), this refers only to the elements of custom and not to the customary rules themselves.

Alternatively, state practice or *opinio juris* could be considered as manifested intentions of States. Especially *opinio juris,* defined as the acceptance of the practice as law,[36] is closest to the concept of intention, since both intention in the case of treaties and opinio juris in the case of custom refer, according to some,[37] to a psychological element. But two queries can be raised here. Firstly, can *opinio juris* be analogized to text and, therefore, supplant the necessary similarity to be able to state that the two processes – treaty interpretation and interpretation of custom – are similar in essence? Secondly, if manifested intention is accepted to be embodied in *opinio juris* and interpretation is an act of discerning the meaning of manifested intention, would this not mean that to interpret (in the meaning of 'interpretation' for which the prototype is treaty interpretation) the manifested intention in custom would be to interpret *opinio juris*, rather than the customary rule itself?

The answer to the first question would, at first glance, be a negative one. This is because, firstly, text is by form very different from *opinio juris,* according to the perspective of those authors who understand *opinio juris* as an internal/psychological (as opposed to manifested) conviction.[38] Moreover, text in the case of treaties acts as a repository of meaning or intention and is not *equated* with intention. *Opinio juris*, on the other hand, being, similar to intention, a psychological element cannot act as a *repository* or reflection of intention. Even considering *opinio juris* as a concept which does not refer to the allegedly internal fora of a State, but rather to the consolidated collective acceptance of a practice, the external manifestation of this collective *opinio juris* would be the documents presented to evidence it (for example, treaties, resolutions of international organizations).Therefore, to be more accurate, it would be the evidence of *opinio juris* that would act as manifestation of intention and could potentially be subject to interpretation.

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[36] Draft Conclusions on Identification of Customary International Law, With Commentaries ILC Report (A/73/10) on its Seventieth Session, 123.

[37] For examples see László Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail' (2014) 25 European Journal of International Law 529, 542 ftn. 58.

[38] *See supra* (n 36).

This leads to the second question: can interpretation of *opinio juris* (or, more accurately of evidence of *opinio juris*) be considered similar to interpretation of text in the case of treaties? There would be many problems with this argument. Firstly, interpretation of evidence of *opinio juris* is not the same as interpretation of customary rules. If this were so, then interpretation, in the case of customary rules, would refer back to its elements and, therefore 'identification and interpretation would be conflated'.[39] Moreover, *opinio juris* is just an element of custom and is not equal to a customary rule; in essence, their relationship can be qualified as a part-whole relationship. In addition, based on the examples of case law, it can be noted that judges do not refer back to the elements of state practice and *opinio juris* when they either explicitly say they interpret custom or use methods otherwise applicable to treaty interpretation to construe customary rules. On the contrary, they refer to elements *alien* to those used in identification. Moreover, when judges interpret custom, they are not asking 'what does this custom say?'. The essence of the operation is to determine what the situations are that fall within a customary rule's ambit and what are those that fall outside of it,[40] but not strictly speaking meaning, as in meaning of a text, in the case of treaty interpretation.[41] This interpretative act is undertaken with the aid of different considerations that are not related to either text, state practice or *opinio juris*.

From a conceptual standpoint, the determination of a rule's functioning on the basis of external considerations has been ascribed in older legal literature with the term 'construction'. In the writings of Francis Lieber – the author of the Lieber Code from 1863, which was the first codification of the laws of war – he distinguishes between 'interpretation' and 'construction'.[42] According to Lieber, similarly to the authors of the Harvard Draft and the ILC members, interpretation was concerned with the meaning of the text.[43] Construction, on the other hand, was an operation that intervened in cases of contradiction or in cases where a novel situation presents itself that is not precisely governed by a law and the judge, bound by the obligation not to pronounce a non-liquet, should find a law applicable to the case.[44] The merit of construction, therefore, is that it intervenes there where interpretation *stricto sensu* cannot act.

This distinction between 'interpretation' and 'construction' was considered by the Harvard Research group when drafting the principles on treaty interpretation. However, the members of the research group sided with the opinions expressed in the influential writings at the time and concluded that with respect to treaties there was only a difference of degree and not of kind between construction and interpretation.[45] This has led them to decide upon using only the word 'interpretation' – an approach later followed by the drafters of the VCLT and, as a result, to the

[39] Gourgourinis (n 21) 36.
[40] Orakhelashvili (n 3) 500.
[41] This, of course, may raise in turn questions on the relationship between interpretation and application, which, however, are excluded from the scope of this paper. See Gourgourinis (n 21); Maarten Bos, A Methodology of International Law (Asser Institut 1984) 110-112.
[42] Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, With Remarks on Precedents and Authorities* (Charles C Little and James Brown 1839) 55-56.
[43] Ibid 55.
[44] Ibid 56.
[45] Draft Convention on the Law of Treaties (n 24) 939.

birth of a complex concept which is, on the one hand, closely tied to text as in the *stricto sensu* definition of custom, but at the same time does not draw solely upon text.[46]

How is this relevant to the concept of interpretation of custom? Firstly, despite the fact that the same word is used both with respect to treaties and with respect to custom, it does not (necessarily) signify identity in the essence of the process. Judging from practice, it appears that the essence of 'interpretation' of customary international law is closer to that of construction than to interpretation *stricto sensu*. Consider this observation by Judge Shahabudeen, which appears to be similar to Lieber's definition of construction:

> 'In the process of clarification, the Tribunal has the competence, which any court of law inevitably has, to interpret an established principle of law and to consider whether, as so interpreted, the principle applies to the particular situation before it.'[47]

It can, therefore, be said when a comparative *theoretical* reflection is undertaken between treaty interpretation and interpretation of custom, it emerges that, albeit united by name and also by similarity in methods, the two process differ in certain respects. One process is strongly tied to the determination of the meaning of a text and proceeds from this point (although is not limited to it, since, as the Harvard Research Draft shows, treaty interpretation contains both interpretation *stricto sensu* and construction of treaties – for instance, teleological interpretation), whereas the other one is concerned with determining, absent a text, whether a certain particular situation falls under the scope of a rule.[48]

In conclusion, from a theoretical perspective, treaty interpretation, as a notion, is broader than interpretation of customary international law from the vantage point that the former encompasses both interpretation *stricto sensu* and construction (or interpretation *lato sensu*), whereas interpretation of custom is mainly a form of interpretation *lato sensu.* Up until this point, judging from the theoretical reflection that was undertaken, given the notable difference between treaty and custom with respect to the lack of a text in the case of the former and the importance played by the text in the case of treaty interpretation (which makes it possible to argue that it is one of the key properties of the concept of treaty interpretation), it appears that there are differences with respect to the act of interpretation in the case of custom compared to that in the case of treaty. These differences, however, do not undermine the possibility that customary rules can be, similarly to treaty rules, interpreted, in the *lato sensu* meaning of 'interpretation', which includes construction.[49]

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[46] It is interesting to notice, however, that although 'construction' is not mentioned in Articles 31 and 32 of the VCLT, they are mentioned in Article 63(1) of the Statute of the ICJ, which reads: 'Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.'

[47] *Prosecutor v. Hadzihasanović* (n 5) Partial Dissenting Opinion of Judge Shahabuddeen [9].

[48] At the same time, however, it should not be overlooked that, in practice, judges sometimes rely on the treaty text to determine the content of customary rules. *See infra* Section 1.3.

[49] This theoretical reflection can be challenged from a pragmatic standpoint. One may argue that, given that interpretation can apply to custom, even if there is no perfect overlap with the concept of treaty interpretation, any theoretical analysis lacks any real value. However, the subject of interpretation of customary rules proves, like no other, the fact that lawyers may use same legal terms, yet conceive of them differently and missing the point behind each other's arguments. This is why determining, at the outset, the essence of interpretation of custom and its difference from treaty interpretation aims to bring more clarity and accuracy to the debate.

1.3. Distinguishing between Interpretation of CIL and Treaty Interpretation in Practice

Having discussed the difference between interpretation of CIL and treaty interpretation from a theoretical standpoint, the inquiry now turns to the issues that have arisen in practice related to the two processes.[50] The main issue that has been identified so far is the usage of treaties for the interpretation of customary rules that may raise concerns regarding the proper application of the law. Since treaty rules are binding only on the parties to the treaty, judges should be diligent when relying on treaties in the process of interpretation of customary international law, so that the interpretative exercise does not result in actually applying the treaty norm (which may have a different content from its customary counterpart) instead of the customary rule.[51]

One example where treaty provisions have been used for the purposes of construction of customary rules is one of the the previously mentioned dissenting opinion in the *Hadzihasanović* case. When determining the scope of action of the customary principle of command responsibility, Judge Shahabudeen argued that 'any interpretation [of the customary rule] can be made by reference to the object and purpose of the provisions laying down the doctrine'.[52]

By the same token, in the landmark *North Sea Continental Shelf* case, in his dissenting opinion, Judge Sørensen has argued that, in cases where treaties are evidence of a generally accepted rule of law (a customary rule), for the purposes of determining the scope and implications of a customary rule, it is necessary 'to have recourse to ordinary principles of treaty interpretation, including, if the circumstances so require, an examination of the *travaux preparatoires'*.[53]

Both examples display a common position of the judges – that customary rules can be interpreted through the route of treaty interpretation. These two examples should be distinguished from the ones discussed in Section 1.1. Whereas in those examples judges argued that customary rule are to be interpreted by reference to either the purpose of the legal institution to which the rules belongs or, for instance, the spirit of the branch of law of which the rule is part, here interpretation of a customary rule is to be done through the interpretation of the treaty. The main advantage of such an approach is that it eases the task of the interpreter. Having a text as a reference point allows for a more straightforward interpretation of a rule, which might be more acceptable to the subjects of law because of its predictability (achieved through the written/codified nature of the rule). At the same time, however, this approach may lead to a misapplication of the law – the application of a treaty rule which is not clearly established as a customary rule. As the name itself says, interpretation of customary rules concerns custom, and not treaties. This means that the object of content determination should be customary rules. However, a codified customary rule (which has become a treaty rule) can have a different content from its customary rule counterpart, when viewed at different moments in time. As D'Amato observed decades ago when critically commenting on the ICJ's ruling in the *Nicaragua* case, it cannot be automatically accepted that, through time, a customary rule, which

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[50] See also Birgit Schlutter, *Developments in Customary International Law. Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff 2010) 86-110.
[51] Similarly to the observations on textual interpretation by Merkouris (2015) (n3) 264-265.
[52] *Prosecutor v Hadzihasanović* (n 72) Dissenting Opinion Judge Shahabudeen [11]. Judge Shahabudeen refers to the provisions of Additional Protocol I to the Geneva Conventions.
[53] *North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands)* (Merits, Dissenting Opinion Judge Sorensen)1969 ICJ Rep 3 [13] emphasis added

has crystallized from a treaty, preserves the same meaning as the treaty rule, because customary rules are subject to evolution and, thus, modification.[54] It follows from this that if judges rely too much on the text of either a treaty which has codified a customary rule or a treaty from which a customary rule has crystallized, this might result in departing from the actual content of the customary rule at the time of interpretation.[55] Therefore, even if the text of a codified customary rule may serve as a starting point in interpretation, judges should be mindful of the difference between the two processes, so as not to engage in treaty interpretation (interpretation of the codified customary rule), instead of the content of the customary rule itself.

2. Interpretation of Customary International Law and Identification of Customary International Law

This Section is dedicated to distinguishing between interpretation of customary international law and identification of customary rules. Firstly, Section 2.1. distinguishes the two processes by reference to their different aims. Secondly, Section 2.2. examines the objects of analysis in identification of custom, as opposed to that of interpretation of custom. It focuses on distinguishing between interpretation of state practice, which is a process that happens at the stage of identification of customary rules, and interpretation of customary rules themselves. Thirdly, the inquiry of Section 2.3. distinguishes identification from interpretation of customary rules according to the method used.

2.1. The Different Purposes of Interpretation and Identification of Customary Rules

Identification of customary international law is both a process of law-ascertainment and a process of content determination.[56] It seeks, by examining evidence of state practice and *opinio juris*, to determine whether a customary rule exists and what its content is.[57] Similar to identification, interpretation of customary international law is also a process of content determination.[58] However, it is a process of content determination that takes place only after the customary rule has been first identified. This relationship between the two processes can be seen as mirroring (to a certain degree) what happens in treaty law. Firstly, the judge finds the relevant applicable rule (which, strictly speaking, is an act of law-ascertainment),[59] which already has a content embodied in the text, and only then the adjudicator can proceed to the interpretation of the rule.

In the case of customary rules, although there are two processes of content determination, they are in no way contradictory, because the two operations have two different aims. The initial content determination process seeks to find the customary rule itself and initially determine its

[54] Antonio D'Amato, 'Trashing Customary International Law' (1987) Vol. 81 No. 1 The American Journal of International Law 101, 103-105.
[55] *See also* Merkouris (n 5) 264-265.
[56] Jean d'Aspremont, 'The Multi-Dimensional Process of Interpretation' in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (OUP 2015) 112, 118.
[57] Ibid.
[58] See *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, Award 11 October 2002 [113].
[59] Some writers may qualify this as interpretation as well. In this sense, *see* Serge Sur, *L'interprétation en droit international public (*Librairie générale de droit et de jurisprudence 1974) 190 et seq.For a contrary position *see* Bos (n 4) 108-109.

content – to make the inductive generalization out of a collection of state practice.[60] The subsequent operation of content determination, as mentioned in Section 1, has at its core the aim to determine whether a particular situation falls under the rule, whenever the initial content of custom does not contain a ready-made provision for that particular situation. At the same time, interpretation of customary law resolves the practical issues which would have arisen if judges would have to identify customary rules '*each and every time* they are applied'.[61] Together, however, these two processes work in a dialectical manner to shape the content of customary rules.

2.2. Object of Scrutiny – Interpretation of State Practice versus Interpretation of Customary Rules

Identification of customary international law seeks to determine whether a customary rule has emerged and what its content is. To determine whether a customary rule has emerged, *state practice* and *opinio juris* should be identified. Therefore, in the process of identification of custom, the elements of custom are the objects of scrutiny.

Interpretation of customary law, on the other hand, concerns the customary rule itself and not one of its elements – neither interpretation of state practice nor interpretation of *opinio juris*. In legal scholarship, however, the concept of 'interpretation' is frequently used in this second meaning – concerning the elements of custom and not the customary rule itself. A few examples are in place. 'Interpretation' was used as referring to the elements of customary rules by Roberts[62] and, more recently, by Banteka.[63] Both scholars applied the interpretative theory of Dworkin[64] to the *identification* of customary international law.[65] According to them, 'interpretation' refers to the situation when after identifying state practice and *opinio juris,* judges are faced with the problem of inconsistent practice.[66] Such a problem occurs when there is state practice supporting the fact that a customary rule has emerged, whereas, on the other hand, there are equally compelling examples of (other) states' behavior that contradicts the pattern initially identified in state practice. Roberts uses the prohibition of torture to exemplify such a situation.[67] On the one hand, there are some States which do not engage in acts of torture, whereas, on the other hand, there are examples of State behavior torturing individuals without protest from other States. In such a case, the argument goes, there are two possible interpretations of state practice: (1) torture is permitted and (2) torture is prohibited.[68] This leads Roberts to conclude that 'state practice and *opinio juris* are not fixed considerations, but are open

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[60] Merkouris (2017) (n 3) 136.
[61] Ibid 135 emphasis in original.
[62] Anthea E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 Am J Int'l L 757.
[63] Nadia Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39(3) Michigan Journal of International Law 301.
[64] See Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University 1986).
[65] According to Michael Byers (in *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 140; among other authors who refer to 'interpretation' as 'interpretation of state practice' is Peter Haggenmacher in 'La doctrine des deux elements du droit coutumier dans la pratique de la cour internationale' (1986) 90 *Revue generale de droit international public* 5. In a similar vein it is also used by W. T. Worster in 'The Deductive and Inductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 Georgetown Journal of International Law 445. Worster talks about the interpretation of objective behavior of states evidencing their subjective beliefs.
[66] Roberts (n 44) 781.
[67] Ibid 781.
[68] Yet,it ignores the third possibility: that there is neither a prohibition, nor a permission to torture.

to interpretation.[69] Therefore, she argues that for the purposes of interpretation of the torture prohibition, the considerations of States on the immorality of torture carry greater weight and determine the second interpretation as the correct one.[70]

The concept of 'interpretation' was also used by reference to the elements of custom by Koskenniemi, albeit in a slightly different meaning than by Roberts and Banteka. Koskenniemi talked about interpreting the action of a State A that allows another State's warships to enter the former's port without its authorization.[71] On this point, he asserted that the behavior of State A may be understood as a belief that the behavior is legally obligatory, or it can also be understood as a mere act of political convenience or even an acquiescence to an act it does not consider legal, but which it allows because of fear of pressure from the second State.[72] In this usage, 'interpretation' is used as a concept that does not refer to state practice, but rather to the motivation of the State behind the behavior. Otherwise, by 'interpretation' Koskinniemi here means the inspection of whether there is a requisite *opinio juris*.

Still another way that interpretation can be used alongside state practice is when a certain state declaration, which is considered for the purposes of potential state practice forming a customary rule, is being interpreted. This example is qualitatively similar to interpretation of unilateral declarations of states.[73] If a state declaration is interpreted in the exercise of customary law identification, then it is a form of interpretation of state practice.[74] However, again, it is qualitatively different from interpretation of the customary rule itself and the two should not be conflated.

In the recent ILC Draft Conclusions on the Identification of Customary International Law,[75] 'interpretation' appears in Part Five of the Conclusions. The ILC states that treaties, resolutions of international organizations, judicial decisions can be used to *interpret* practice relevant for the identification of customary international law.[76] The language used by the ILC is ambiguous and does not allow one to fully comprehend whether the reference was used in the same sense as in legal scholarship or is intended to convey something different. This is because the ILC posits that materials (treaties, judicial decisions etc.) when not taken as instances of state practice or *opinio juris* may aid in determining the existence or content of customary international law. Since both identification of custom and interpretation are processes of content determination, the reference of the ILC to content may be read as being a reference to either of the two processes – identification or interpretation of custom. The matters are complicated by the ILC quoting the *Continental Shelf* case where it has been stated that treaties may have an important role to play in defining rules deriving from custom or in developing them.[77] The reference to 'defining' rules deriving from custom may read as a reference to either of the two processes. Yet coupled with the word 'practice', it is most likely that it had ascribed to the word 'interpretation' a similar

[69] Ibid.
[70] Ibid.
[71] Martti Koskenniemi, *From Apology to Utopia: the structure of international legal argument* (CUP 2005) 435.
[72] Ibid.
[73] ILC, Yearbook of the International Law Commission 2006, Vol. II, 'Report of the International Law Commission on the Work of its 58th Session' (1 May–9 June and 3 July–11 August 2006), UN Doc A/61/10, 2006, 160-177
[74] Cite possibly ILC Draft conclusions
[75] ILC, 'Report of the International Law Commission on the Work of its 70th Session' UN Doc A/73/10.
[76] Ibid 142.
[77] Ibid 143.

meaning to that given by Roberts and Banteka. This, however, should not be understood to mean that the ILC members have not accepted the possibility of customary rules being open to interpretation in a sense that is different from interpretation of state practice. Although the ILC Draft Conclusions concern only identification of customary international law and the term 'interpretation' was used by reference to the elements of custom and not the customary rule itself, the debates in the ILC portray that the term 'interpretation' has also been used by reference to rules of customary international law. Firstly, the term appears to be used with such a meaning in the exchange between Shinya Murase and Michael Wood regarding the definition of 'identification'. Murase objected to the fact that the ILC draft conclusions did not give a clear definition of 'identification'. He considered that such a definition was necessary in order to determine whether identification included interpretation and application of customary international *law*.[78] Wood responded that 'if it was possible to speak of interpreting customary international *law*, determining the existence or non-existence of a rule and its detailed content could amount to interpretation.'[79] Subsequently, 'interpretation' was referred to by Mathias Forteau, who affirmed that the European Court of Human Rights has given 'a slightly different interpretation of the customary *law* applicable to immunity'.[80] Besides reference to interpretation of customary law, some ILC members have referred to interpretation of customary *rules.* Marie G. Jacobsson made a comment with respect to the practice of the European Union – 'if an international court found that the European Union's interpretation of *a rule* of customary international law in an area where it had exclusive competence accurately reflected customary international law, it would be difficult to maintain that the practice did not amount to State practice.'[81] In addition, Mahmoud D. Hmoud called for a clarification of the situations when acts of the state (esp. decisions of national courts) are either samples of state practice (otherwise said, 'raw material' for the purposes of identification of CIL) or show the *interpretation* given by the state to a particular *rule* of CIL.[82] Finally, Georg Nolte, when emphasizing the interaction between customary international law and the general principles of law, noted that 'it was thus conceivable for a customary *rule* to be *interpreted* in the light of a recognized general principle'.[83] [84]

The importance of this descriptive account is that it paints an overall picture of how the ILC conceives the term 'interpretation' and its place in the realm of CIL, which is otherwise not

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[78] ILC, 'Provisional Summary Record of the 3397th Meeting from 11 June 2018' UN Doc A/CN.4/SR.3397, 3 Emphasis added.
[79] ILC, 'Provisional Summary Record of the 3338th Meeting from 2 May 2017' UN Doc A/CN.4/SR.3338, 5 Emphasis added. *See also* ILC Draft Conclusions on Identification of Customary International Law, Comments and Observations by the Kingdom of the Netherlands [5].
[80] ILC, Yearbook of the International Law Commission 2012, Vol. I, 'Summary Record of the 3150th Meeting' UN Doc A/CN.4/SR.3150 [64] Emphasis added.
[81] ILC, Yearbook of the International Law Commission 2013, Vol. I, 'Summary Record of the 3184th Meeting' UN Doc A/CN.4/SR.3184 [53], 100 Emphasis added. Outside of any reference to the practice of international courts and tribunals, 'interpretation' was mentioned by the representative of Slovenia, Ernest Petric, who contended that 'unless codified, customary international law was unwritten law, and the consequences of that fact in terms of its identification and interpretation should also be considered' (ILC, 'Provisional Summary Record of the 3225th Meeting as of 18 September 2014' UN Doc A/CN.4/SR.3225, 7). His comment is important because it seems to imply that identification and interpretation are two different processes, since they are mentioned separately.
[82] ILC, Yearbook of the International Law Commission 2013, Vol. I, 'Summary Record of the 3183rd Meeting' UN Doc A/CN.4/SR.3183 [21], 93 Emphasis added.
[83] Ibid [14] 92, emphasis added.
[84] See also Advisory Committee on Issues of Public International Law on the draft conclusions, 4-5: https://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_nr._29_-_Identification_of_customary_international_law_-_November_2017(2).PDF

reflected in the draft conclusions. Up until this point, it seems that the reference to interpretation comprises an array of different meanings. In some cases, ILC members have referred to it as synonymous to judgment on state practice (similarly to Roberts, Banteka and Koskenniemi), while, in other cases, as a process similar to treaty interpretation. This is evidenced by the italicized references to customary rules or customary law. The reference to 'interpretation' as a process analogous to treaty interpretation, rather than interpretation of state practice, is especially visible in the remarks of Murase and Nolte. Murase has explicitly distinguished 'interpretation' from 'identification'. Should these two operations have been considered as one and the same thing, there would have been no reason to differentiate between them. Nolte's statement, while not distinguishing between identification and interpretation explicitly, does give a meaning to 'interpretation' that is by method more analogous to treaty interpretation. Nolte's statement is strikingly familiar to the rule of systemic interpretation (See Section 1) and shows that it is not only in judicial practice, but also among ILC members that interpretation of customary rules is understood in a similar way.

Therefore, as demonstrated, though the concept of 'interpretation' is used at the stage of identification, it should not be conflated with interpretation of customary rules. In other words, the interpretation of a customary rule 'related to the essence of that rule, not to the pieces of evidence'.[85]

2.3. Method in identification and interpretation of custom

The inquiry now turns to discussing the issue of method – the method used when judges identify customary rules and the one used when judges interpret customary rules. According to Merkouris, in the case of identification of customary law the process is primarily inductive, whereas interpretation of customary rules is a deductive process.[86] Induction, in law, is 'the act or process of reasoning from specific instances to general propositions', whereas deduction – 'the act or process of reasoning from general propositions to a specific application or conclusion.'[87] The process of identification of customary international law is inductive in the sense that the judge looks at individual instances of state practice (specific instances) and forms a 'generalization', which becomes the customary rule itself. Interpretation, on the other hand, is said to be a deductive process, because the judge arrives from a customary rule (a generalization) to a specific application of the rule.

In the practice of international courts, the opposition between 'induction' and 'deduction' as methods in customary rules law-ascertainment originates from the *Gulf of Maine* judgment, where the ICJ noted that 'customary rules whose presence in the *opinio juris* of States can be tested by *induction* based on the analysis of a sufficiently extensive and convincing practice, and not by *deduction* from preconceived ideas'.[88] There is a possibility that the Court in 1984 may have been influenced by Georg Schwarzenberger's work on the inductive method in

[85] Orakhelashvili (n 3) 497, see also Merkouris (2017) (n 3) 138.
[86] Merkouris (2017) (n 3) 134-137.
[87] Black's Law Dictionary (n 29).
[88] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (1982) ICJ Rep 246 [111].

international law.[89] His book/contribution was inspired by the *obiter dictum* of the Privy Council of the UK in *Piracy Jure Gentium,* where it stated that international law is derived from various sources (such as treaties, State papers etc.) and this process is one of inductive reasoning.[90] Schwarzenberger expounded the advantages of the inductive method against the uncertainty of deducing customary laws from morality or other considerations.[91] However, the Court itself has on two other occasions referred to deduction, instead of induction, when talking about identification of customary law. For instance, in the *Fisheries Jurisdiction* case the ICJ noted that 'no firm rule could be deduced from state practice as being sufficiently general and uniform to be accepted as a rule of customary law fixing the maximum extent of the coastal State's jurisdiction with regard to fisheries'.[92] Another example is the *Arrest Warrant* case where the ICJ stated that 'it has been unable to deduce from this practice [state practice, including national legislation and decision of national higher courts'] that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity'.[93] How can one explain such divergence in the language of the World Court?

On the one hand, it could be taken as an indication that the Court used deduction instead of induction or, on the other hand, that the Court merely used a word synonymous with 'to reason' and expressed itself in more broad terms without making a certain pronouncement on the method to be followed in the case of establishing the existence of customary rules. In legal scholarship it has also been argued that, on the contrary, the Court uses *both* induction and deduction when identifying customary rules.[94] In other words, the ICJ engages in a dialectical process, rather than in either induction or deduction, which may also explain the Court's inconsistent language on the question of method.

Interpretation of customary rules has not been methodologically explained by judges, but is described as a predominantly deductive process.[95] Taking the rule of command responsibility as an example, interpretation of custom can be imagined in the form of a deductive logical argument in the following terms:

> 'All rules must be interpreted in accordance with the object and purpose of the branch of international law to which it belongs'
> 'The rule of command responsibility belongs to international humanitarian law (IHL)
>
> The object of IHL is to protect persons in armed conflict
>
> Then, the customary rule of command responsibility must be interpreted in accordance with the purpose of protecting persons in armed conflict.'

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[89] Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 Harvard Law Review 539.
[90] Ibid quoting *In re Piracy Jure Gentium* [1934] AC 586 [589].
[91] Ibid.
[92] *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Rep 432 [21].
[93] *Case Concerning the Arrest of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Jurisdiction & Admissibility) (2002) ICJ Rep 3 [58].
[94] Worster (n 47); S. Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417.
[95] Merkouris (2017) (n 3) 134.

This argument indeed points the way to the judge as to how a rule should be interpreted by using the method of object and purpose. However, it does not fully capture the whole process that happens in the interpretation of custom, because it does not show how a judge reaches a specific interpretative result before applying the rule to the case at hand, which will also be a process of deductive reasoning. In other words, in this example, deductive reasoning does not allow the judge to decide whether a commander who assumed command only after the commission of the acts by subordinates can be held responsible under the rule of command responsibility. It appears that an extra step is needed to reach the interpretative solution. After determining as to how or in light of what the rule should be interpreted, the judge cannot automatically arrive at an interpretative result, but, most of the times, will be faced with many potential interpretative results and by using the methods of interpretation (either by using some of them or one of them, which is perceived by the judge as the most appropriate one) will arrive at one interpretative result. Qualitatively this process resembles a decision-making process, rather than a process of reasoning. This (obscure) decision making process will be followed, again, by a deductive step – in the case exemplified, to determine, based on the facts of the case and the rule arrived at after interpretation, whether the particular commander can be held responsible or not.

Turning back to identification of customary international law, Roberts and Banteka also seem to suggest, albeit calling it interpretation, that there is a similar process of decision-making at play even in the case of customary law identification. This means that, although broadly speaking the method is different in the case of identification and that of interpretation of custom, within the cognitive process of the judge itself, there are various methods at play that might not be that different for both identification and interpretation of customary international law.

2.4. Interpretation of Customary International Law and Deductive Reasoning

A connected question to the issue of method is whether interpretation of customary international law, as a process, differs from deductive reasoning. Mathias Herdegen has advanced the idea that the clarification of the scope of customary rules, albeit possible in ways that do not fall under classic 'identification', is not interpretation either.[96] According to him, the content determination of custom is possible by way of a syllogism, which is structurally different from interpretation.[97] Syllogism is another name for deductive *logical* reasoning.[98] An argument is deductively valid if 'the truth of the premises is *necessarily sufficient* for the truth of the conclusions'.[99] Necessity here is key. If the conclusion is only likely and not necessary, the argument cannot be qualified as deductive.

In his article, Herdegen gives the *North Sea Continental Shelf* case as an example of cases where the ICJ has determined the content of a customary rule by means of a syllogism. The issue at stake in this landmark case was the criterion that had to be used by the parties for the delimitation of their continental shelves. Two judges, in their dissenting opinions, Judge Morrelli and Judge Tanaka, used deductive reasoning to conclude on the content of custom. Judge Morelli argued that the customary rule prescribing the equidistance criterion for the

[96] Mathias Herdegen, 'Interpretation in International Law' MPEMPIL 723 (March 2013) [61].
[97] ibid.
[98] https://www.lexico.com/definition/syllogism accessed 15 December 2019.
[99] Jc. Beall, G. Restall, G. Sagi, 'Logical Consequence', *The Stanford Encyclopedia of Philosophy* (Spring 2019 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/spr2019/entries/logical-consequence/> accessed 13 November 2019, emphasis in original.

delimitation of the continental shelves of various States is 'a necessary consequence of the apportionment effected by general international law on the basis of contiguity'.[100] He reasoned that if, according to international law, a continental shelf exists *ipso facto*, then, for the rule to function (and not contradict itself), it should include a criterion of apportionment of the continental shelf that would operate automatically. Therefore, he considered that the method of equidistance is deduced from the rights over the continental shelf. Judge Tanaka reasoned in a similar way. He argued that 'the equidistance principle constitutes an integral part of the continental shelf as a legal institution of a teleological construction' and 'the delimitation itself is a logical consequence of the concept of the continental shelf that coastal States exercise sovereign rights over their own continental shelves'.[101]

The reference to teleology can be read in two different ways. On the one hand, it could be read as a form of teleological interpretation (in light of object and purpose). However, the overall argument of the judges rests on the *logical* necessity of including a delimitation method in the rule on the continental shelf,[102] which is more akin to deductive reasoning than to the methods found in treaty interpretation.

A similar type of reasoning on the content of a customary rule can be observed in the dissenting opinion of Judge Hunt in the *Hadzihasanović* case mentioned earlier (see Section 1). Judge Hunt argued that since command responsibility was not a direct form of responsibility (as individual criminal responsibility is), there is no requirement for a temporal overlap between the moment that the subordinates commit the offence and the commander-subordinate relationship.[103] This statement could be seen as an example of systemic integration within which deductive legal reasoning is used, since the reference is made by judge Hunt to the more general rule of command responsibility. However, while in systemic integration, as it appears in Article 31 of the VCLT, reference is made to *relevant rules*, in this example, Judge Hunt refers to the characteristic of the same rule – that of command responsibility. Therefore, according to this author, similar to the approach of Judge Morelli and Judge Tanaka in the *North Sea Continental Shelf*, the argument of Judge Hunt is a form of logical argument that is not reliant on other elements. In both cases judges rely on the internal coherence of the rule, as opposed to the examples of interpretation of customary rules in Section 1, where external referents, such as object and purpose or other relevant rules/principles were used to construe the content of customary rules; in these examples the logical principle of non-contradiction seems to take precedence in determining the interpretative result.

However, reliance on logic does not *per se* determine the conclusion that the use of deductive reasoning, firstly, excludes the possibility of interpretation of customary rules[104] and, secondly, that it cannot be encompassed within the broader notion of interpretation. Taking the example of treaty interpretation, from the vantage point of extreme positivism, methods of treaty

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[100] *North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands*) (Merits, Dissenting Opinion Judge Morelli) 1969 ICJ Rep 3, 197 [6].
[101] Ibid [53].
[102] It can be argued that although logical necessity is obvious and requires the existence of *a* method of delimitation to be included in the rule, it does lead to the conclusion that a particular method of delimitation (for instance, equidistance) is included in the rule on the continental shelf.
[103] *Prosecutor v. Hadzihasanović* (n 5) Separate and Partially Dissenting Opinion Judge Hunt [9].
[104] *See supra* Section 1 for examples where methods other than deductive logical reasoning are used to construe the content of customary rules.

interpretation are limited to those contained in Article 31 and Article 32 of the VCLT. In practice, however, international judges make use of other interpretative principles, including legal maxims which seek to ensure coherency among legal norms and are, to some extent at least, premised on logic.[105] Considering this, there are no cogent reasons to refuse including deductive reasoning within the umbrella of interpretation of customary international law.

Conclusion

This paper aimed to analyze the extent to which interpretation of customary international law differs from treaty interpretation and identification of customary international law. Firstly, an analysis of the potential differences between interpretation of customary international law and treaty interpretation was undertaken. Section 1.1. introduced the concept of 'interpretation of customary rules' based on how it appears in the practice of international courts and tribunal.

Section 1.2. demonstrated that interpretation of customary international law in the practice of international courts and tribunals is similar to the methods used by judges to treaty interpretation. Three examples were given in this sense. Firstly, textual interpretation of custom was discussed. It was shown that, in practice, judges referred to 'ordinary meaning' when making an argument concerning the content of custom, yet it is difficult to say that customary rules can be interpreted *stricto sensu* in the same way that treaty rules are. Secondly, teleological interpretation of customary rules was discussed. It was demonstrated that judges resort to the object and purpose of either the customary rule or the branch of law to which the customary rule belongs to, as opposed to treaties, where it is the object and purpose of the treaty that aids the interpreter in construing the treaty rule. Thirdly, the inquiry examined an instance of contextual interpretation of custom by reference to other relevant rules of international law (systemic interpretation) It was shown that, as opposed to, teleological interpretation, systemic interpretation is a method which is applied to customary rules in an identical way as it is in treaty interpretation. Section 1.3 presented some theoretical reflections on the nature of the interpretative process in the case of custom and in the case of treaties. It was argued that the characteristics of treaty rules vs custom rules have an impact on the nature of the interpretative process. It was argued that whereas the notion of 'interpretation' in treaty law is strongly attached to text, interpretation of custom is closer to the concept of 'construction'.

Section 1.4. discussed the issues that appear in practice when judges interpret custom by relying too much on the text of the treaty which either codified or led to the crystallization of a customary rule. It was argued that, albeit having a practical advantage – the ease with which a rule can be determined that is the same in custom and treaty, it might disregard the fact that a custom rule may have evolved in the meantime and, for this reason, result in the interpretation and further application of the treaty rule instead of the customary rule. Therefore, it is important for judges to bear in mind that using the treaty text is permissible as long as it is a form of systemic interpretation of custom and the text of the treaty is not taken as an ultimate statement on the content of a customary rule.

[105] *See* the discussions in Joseph Klinger, Yuri Parkhomenko, Constantinos Salonidis, *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) ,

Section 2 discussed the difference between interpretation and identification of customary international law. Firstly, it argued that the two processes have two different purposes. Whereas identification of customary international law is both a law-ascertainment process and a content determination process, interpretation only seeks to determine the content of a rule after its existence has already been acknowledged. Secondly, it was shown that the concept of 'interpretation' is often used alongside state practice, but has a different meaning as opposed to the interpretation of customary rules. By drawing examples from scholarly literature, but also from the discussions in the ILC, it was argued that the two operations are different in their object and nature. It was also noted that although in the body of the ILC Draft Conclusions on the Interpretation of Customary International Law interpretation appears as referring only to state practice, the ILC discussions revealed a more multifaceted understanding of the concept of 'interpretation', which confirms that interpretation goes far beyond interpretation of state practice. Section 2.2. examined the question of method in both identification and interpretation of customary international law and concluded that although identification and interpretation seem to use different methods, there are overlaps. This analysis was followed by an inquiry in Section 2.3. of the examples in case law where deductive reasoning was used to construe the content of customary rules. It was argued, firstly that deductive reasoning is not the only method used to construe the content of customary rules and, secondly, that deductive reasoning may, similarly as in treaty law, be included within the broader notion of interpretation.

Taking the points made in this paper as a whole, the crux of the matter is that the processes that have been analyzed are, albeit *different* in some respects strings of the *same* harp. Interpretation of customary international law borrows its methods from treaty interpretation, albeit not being the same in its nature, because, as opposed to treaty rules, it is an unwritten source of law. At the same time, interpretation of custom is a solution for the tediousness of the process of custom identification, which, absent interpretation, would have to be undertaken each and every time that a particular situation related to a customary rule, but which is not covered by such a rule, arises. Together, these techniques, as *elements* shape the content and evolution of the *whole* body of customary international law.